Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-5050

* * *

WILLIAM JACK HAMMETT,

Petitioner

V.

STATE OF TEXAS,

Respondent

* * *

On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals
Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

OPINIONS BELOW

William Jack Hammett was tried for capital murder in No. 10,509 in the Twenty-third District Court of Brazoria County, Texas. There is no reported opinion of this decision. Appeal was taken to the Texas Court of Criminal Appeals and the case was heard en banc. A majority and dissenting opinion issued but were not published. Copies of these opinions are attached to the Petition for Writ of Certiorari. On Motion for Rehearing the first opinion was withdrawn and a second opinion issued. The second opinion is published at 578 S.W.2d 699 (Tex.Crim.App. - en banc, 1979) reh. denied.

JURISDICTION

The Texas Court of Criminal Appeals entered its last opinion in this case on February 28, 1979. Rehearing was denied on April 11, 1979. The petition for certiorari was filed on July 11, 1979, ninety-two days after the entry of the order denying rehearing and one hundred forty-three days after the entry of the final judgment in this case.

Rule 22 of the Rules of this Court provides:

1. A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it is filed with the clerk within ninety days after the entry of such judgment. A justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding sixty-days.

There is no indication, by letter or otherwise, that Petitioner ever requested an extension of time.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner claims a right under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. The case involves application of the Texas Penal Code, §19.03; and Texas Code of Criminal Procedure art. 37.01. Petitioner claims that the case involves art. 3, §31 and §35 of the Constitution of the State of Texas. All these provisions of Texas law are set out in full in the Petition for Writ of Certiorari, pp. 2-5. Finally, the case involves these provisions of the Texas Code of Criminal Procedure:

Art 26.05 Compensation of counsel appointed to defend

Section 1. A counsel appointed to defend a person accused of a felony or a misdemeanor punishable by imprisonment, or to represent an indigent in a habeas corpus hearing, shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held, according to the following schedule.

. . .

(d) For expenses incurred for purposes of investigation and expert testimony, a reasonable fee to be set by the court but in no event to exceed $500;

. . .

Art. 46.02. Incompetency to stand trial

. . .

Examination of the Defendant

Sec.3. (a) At any time the issue of the defendant's incompetency to stand trial is raised, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health or mental retardation to examine the defendant with regard to his competency to stand trial and to testify at any trial or hearing on this issue.

. . .

(g) No statement made by the defendant during the examination or hearing on his competency to stand trial may be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding.

(h) When a defendant wishes to be examined by a psychiatrist or other expert of his own choice, the court on timely request shall provide the examiner with reasonable opportunity to examine the defendant.

. . .

Art. 46.03. Insanity defense

. . .

Examination of the Defendant

Sec.3. (a) If notice of intention to raise the insanity defense is filed under Section 2 of this article, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health and mental retardation to examine the defendant with regard to the insanity defense and to testify thereto at any trial or hearing on this issue.

. . .

(f) When a defendant wishes to be examined by a psychiatrist or other expert of his own choice, the court on timely request shall provide the examiner with reasonable opportunity to examine the defendant.

. . .

QUESTION PRESENTED

WHETHER PETITIONER WAIVED ANY RIGHT HE MAY HAVE HAD, TO APPOINTMENT OF A PSYCHOLOGIST OR PSYCHIATRIST TO TESTIFY CONCERNING THE PROBABILITY THAT PETITIONER WOULD COMMIT CRIMINAL ACTS OF VIOLENCE, BY FAILING TO SEEK SUCH AN APPOINTMENT UNTIL THE VOIR DIRE OF THE JURY WAS CONCLUDED.

Respondent notes that Petitioner's statement of the Question Presented cites Jurek v. Texas, 428 U.S. 262 (1976). Apparently Petitioner means to urge that Jurek established the "right"

of an indigent to appointment of a psychiatrist. In fact, Jurek established only that the Texas capital murder statute, Texas Code of Criminal procedure, art. 37.01, was constitutional when interpreted so as to allow the Defendant to produce evidence of mitigating circumstances.

STATEMENT OF THE CASE

William Jack Hammett, Petitioner herein and Defendant below, was indicted by a grand jury in Brazoria County, Texas, for capital murder. (Record page 1499; hereinafter R. p. ___.) On April 19, 1977, Petitioner, through his retained counsel, filed a Motion for Commitment to a Mental Hospital for Psychiatrist Testing. (Supplemental Transcript, pp. 23-25; hereinafter Supp.T. p. ___.) When Petitioner made this motion, trial was scheduled to begin in a few days. The court immediately appointed Dr. B. W. Henry, a psychiatrist, to examine Petitioner. (R. p. 1492.) Dr. Henry reported to the court, in a letter dated April 24, 1977, that he had examined Petitioner on April 21, 1977. (R. p. 1489.) The nature of the examination was explained to Petitioner, and he was informed of his right not to participate. (Id.)

> He indicated an agreeableness to participate in the examination. He, further, indicated an awareness of the nature of the charges lodged against him, and [Dr. Henry] advised him of his right not to tend to incriminate himself with regard to those charges outstanding.

(Id.) After approximately forty-five minutes of examination, Mr. Hammett indicated that he did not want to continue. (R. p.1490.) Dr. Henry contacted Petitioner's attorney, who talked with Petitioner, and the interview was terminated. (Id.) Following further consultation with his attorney, Petitioner agreed to the resumption of the interview. In his letter of April 26, 1977, Dr. Henry informs the court of the results of this second interview. (R. p. 1483-88.)

On April 26, 1977, Petitioner's first trial began. In the first phase of the trial, under Texas' bifurcated procedure, Petitioner was found guilty of capital murder; but in the second phase of the trial, the jury could not agree on a punishment. A mistrial was declared. (Supp.T. p. 37.) Dr. Henry testified on May 4, 1979, during the second or punishment phase of this trial.

During the months that followed, Petitioner filed an Affidavit of Poverty and the court appointed three attorneys to represent Petitioner, including Mr. Bob Tarrant, who had been Petitioner's retained counsel at his first trial. (R. pp. 1506, 1507 and 1513.) The last of these attorneys was appointed on August 22, 1977, at least partially as the result of Petitioner's Motion for Continuance, which was granted. (R. p. 1510-13.) A very large number of subpoenas were issued at Petitioner's request. He also filed a large number of motions which were heard prior to the beginning of his second trial. Proceedings in respect to the selection of a jury were begun on October 10, 1977. (R. p. 1.) Voir dire and selection of a jury was completed at approximately ten o'clock on October 14, 1977. (R. pp. 748, 767, 804-805.) After swearing in and instructing the jury, the trial judge asked counsel for Petitioner if there was any further business. (R. pp. 808-809.) After all these proceedings had taken place and had adjourned on October 14, 1977, Petitioner's counsel filed a handwritten motion for appointment of a second psychiatrist. (R. pp. 1631-34.) It was denied. (Id.)

In the ensuing trial, Petitioner was convicted of capital murder in the guilt phase and Dr. Henry testified in the punishment phase. (R. pp. 1239-95.) His testimony was

substantially the same as the testimony he had offered at Petitioner's first trial. (Supplemental record, pages 1-22, consisting of the testimony of the witness Bill W. Henry, M.D., adduced on punishment phase May, 1977, trial; hereinafter Supp. R. p. ____.)

The jury determined that the punishment should be death.

Appeal was taken to the Texas Court of Criminal Appeals, which heard the case en banc. When the case was first argued, The Court of Criminal Appeals of the State of Texas decided that Petitioner was denied a fair trial because the court refused to appoint a psychiatrist of Petitioner's choice to testify for the defense. 578 S.W.2d at 705. On the State's Motion for Rehearing, the Court of Criminal Appeals ordered preparation of a supplemental transcript. (Id. at 706.) On rehearing, the Court of Criminal Appeals reversed itself and affirmed the decision of the jury and the court below. The Court of Criminal Appeals held that, where Petitioner had initially requested the examination by a psychiatrist and had had notice of the content of the psychiatrist's testimony for six months, the trial court did not abuse its discretion in denying Petitioner's motion, made after the completion of the voir dire and selection of a jury and without suggesting any mode of proceeding, for appointment of another psychiatrist of Petitioner's choice. (Id. at 707.) The court also rejected Petitioner's contention that the capital murder provisions of the Texas Penal Code are unconstitutional because of alleged violations of art. 3 of the Texas Constitution during their enactment. (Id. at 713.)

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Petition Is Not Timely

As noted in the jurisdiction section, supra, the Petition was filed two days after the date when the Rules of this court

require it to have been filed. Nothing in the record shows that Petitioner had any excuse or asked for any extension. Therefore the writ should be denied.

B. State Law Provides Adequate Protection Of Petitioner's Rights.

The present case is not an appropriate one in which to consider whether an indigent accused has a federal constitutional right to appointment of a psychiatrist, where the State offers psychiatric testimony on the issue of the likelihood that the accused will commit violent acts in the future, for other reasons as well. The State of Texas affords an accused the means of procuring such testimony whether such a federal constitutional right exists or not. Texas Code of Criminal Procedure, art. 26.05 §1(d), provides that the appointed counsel of an indigent accused may be reimbursed for reasonable expenditures, made procuring expert testimony, of up to $500.00. Counsel for an indigent accused needs no permission from the court to obtain such expert testimony. In addition, arts. 46.02 and 46.03 of the Texas Code of Criminal Procedure provide that, where the competence of the accused is in question or insanity may be raised as a defense, the court may "appoint disinterested experts experienced and qualified in mental health or mental retardation to examine the defendant" with regard to these issues. In the present case, Petitioner failed to avail himself of the provisions of art. 26.05. It should be noted that Petitioner did make a motion under art. 46.02, and the court responded by appointing Dr. Henry. Petitioner did not object to the appointment of Dr. Henry. Petitioner voluntarily allowed himself to be examined by Dr. Henry. Petitioner still had available, even at the time when he made his motion for appointment of a psychiatrist of his choice by the court, the

provisions of art. 26.05. Under these circumstances, it is unnecessary to decide whether any federal constitutional right of an indigent accused to appointment of a psychiatrist of his choice to testify in opposition the proffered testimony of a prosecution-called psychiatrist exists. Any such right is encompassed within and obscured by the state created right to hire an expert witness of his own choosing at state expense.

C. The Petition Does Not Raise Substantial Issues

The case, as decided by the Texas Court of Criminal Appeals, does not make any new law. The holding below is consistent with the rationales of Henry v. Mississippi, 379 U.S. 443 (1965), and Wainwright v. Sykes, 443 U.S. 72 (1977). The by now familiar holding of Sykes is that an accused must follow reasonable rules of orderly procedure when raising federal constitutional issues in his trial. Sykes involved the timing of objections; the present case, the timing of a motion. Petitioner raised the issue on which he petitions for a writ of certiorari in a fashion which was certain to disrupt the orderly administration of justice. Although Petitioner had been aware at least since May of 1977 of the content of Dr. Henry's testimony and that the State would offer the testimony in the punishment phase of his trial, Petitioner waited until the close of the voir dire in his second trial, in October of 1977, to move for appointment of another psychiatrist to testify in rebuttal. Petitioner, in this interim period, requested and received numerous subpoenas. Petitioner raised a number of other issues by motion. All these matters were dealt with by the court before voir dire was concluded. Petitioner, in his motion for appointment of a psychiatrist, failed to mention any particular psychiatrist who was available. Unless Petitioner had a psychiatrist

immediately available, a continuance of the trial would have been necessitated. Since a jury had already been empanelled and sworn in, after four days of intensive voir dire examination, such a continuance would have been a major disruption. Thus, even if one accepts the hypothesis that Petitioner had a federal constitutional right to appointment of a psychiatrist of his own choosing, Petitioner waived that right by raising the issue so late. Significantly, Petitioner offers no excuse for failing to raise the issue in the six months prior to the time when he did raise it. The Texas Court of Criminal Appeals recognized that

> there is a distinction between the appointment of legal counsel to represent an indigent defendant and the appointment of a psychiatrist or psychologist to examine him which stems from the distinct difference in the professions. Nevertheless, a defendant may not manipulate his rights to either to obstruct the orderly administration of justice. [citations omitted.]

578 S.W.2d at 707. There is thus an "adequate and independent" state law ground for the decision below. Henry v. Mississippi, 379 U.S. 443 (1965).

Petitioner raises claims based on the Fifth Amendment. The record is clear, however, that Petitioner was advised of his right to remain silent before Dr. Henry began his examination. In fact, Petitioner exercised this right. Petitioner's sole objection is that Dr. Henry examined him with the primary purpose of determining whether Petitioner was competent. Petitioner objects that he waived his right to remain silent only insofar as the issue of competence is concerned. However, Petitioner has made no showing that examination for the purpose of determining competence is in any way different from an examination for the purpose of determining future dangerousness. Without such a showing, Petitioner's argument is not ripe for decision, since there are no facts in the

record to support the proposed distinction. Moreover, even if such a distinction were proved in the record, Petitioner's argument would have to be rejected. To accept it would be to accept that an accused could waive his right to self-incrimination concerning one crime, but not as to lesser included offenses. It would mean that an accused could agree to make a statement concerning his participation in a criminal act, and if the prosecution later decided that the accused's acts were part of a conspiracy, the accused could object that he had waived his Fifth Amendment right only as to the individual crime and not the conspiracy. The absurdity of this result illuminates the underlying fallacy in Petitioner's contention.

Beginning on page 7 and extending through page 9 of his Petition for Writ of Certiorari, Petitioner states a number of theories which he believes the Court should consider if it grants his petition. The following paragraphs will briefly address each one of these hypotheses.

Petitioner first contends that the doctor's testimony exceeded the authority granted under the court's order, and that this violates the Fourth and Fourteenth Amendments to the Constitution of the United States. This appears to be a contention that the doctor's examination was an unreasonable search in that it extended beyond the authority of the court order. However, the "search" was requested by Petitioner. If, in the course of the requested "search," the doctor discovered things which Petiitoner did not intend to be discovered, that does not make the "search" any less invited.

Petitioner's next argument is that he was denied the right to secure expert opinion testimony by the Court's refusal to grant his motion for appointment of a psychiatrist of his own choosing. This is Petitioner's main argument.

It has been previously dealt with.

There follows a complaint that the State was not required to introduce the court's order for an examination, which showed that the examination was for the purpose of determining competence, and that the State was permitted to imply to the jury that the examination was to all points. This is basically a "best evidence" objection. It does not involve any constitutional right. Moreover, Petitioner himself introduced the order. (R. p. 1271; R. p. 1492.) Petitioner does not indicate any point in the record at which the State implied to the jury that the examination was to all points and not to the question of mental competence. If, indeed. such an implication was made, it was rebutted by Petitioner. (R. pp. 1269-76.)

Petitioner's fourth argument is that the psychiatrist formed his opinions concerning Petitioner's dangerousness at least partially as a result of the doctor's examination of Petitioner's juvenile criminal record and upon "unproven allegations of crimes." It is notable that Petitioner is not objecting that this evidence was actually admitted before the jury at either the guilt or punishment phases of his trial. The matters which Dr. Henry reviewed are stated in the second paragraph of his letter of April 26, 1977. (R. p.1483.) It is not at all clear that the statements to which Petitioner objects were critical in the formulation of Dr. Henry's opinion. Nor is it shown that, if the statements were all false, Dr. Henry's opinion would be different. Moreover, it is clear from the text of Dr. Henry's letters that much of the information in the statements was also related by Petitioner in his voluntary conversations with Dr. Henry. Since the record is not clear this issue is not ripe for decision. If there is any error at all, it is

rendered harmless by Petitioner's voluntary statements of the same facts of Dr. Henry.

Petitioner's fifth contention is that he was denied the opportunity to present testimony of mitigating factors relevent to his punishment when the court denied his motion for appointment of a psychiatrist. However, he has made no offer of proof that any psychiatrist would have testified concerning mitigating factors.

Petitioner's contention that he was denied the right to effective assistance of counsel by the denial of his motion for appointment of a psychiatrist is the same as his second argument. The only difference is in the legal theory upon which the argument is based. As was shown earlier, Petitioner had the opportunity to secure his own psychiatrist without the intervention of the court.

In his last argument under this issue, Petitioner contends that, although he was advised of his right to remain silent, he was not advised that he could remain silent on any question other than his competence. This is the Fifth Amendment argument which was dealt with in the early paragraphs of this section.

Finally, Petitioner contends, at page 18 of his Petition, that he has been denied due process of law because the Texas Court of Criminal Appeals has refused to answer a State law question which was properly presented to them. He contends that the Texas capital murder statute is unconstitutional as a matter of state law because the legislature failed to comply with the provisions of art. 3, §§31 and 35 of the Texas Constitution. The answer to this contention is that the Texas Court of Criminal Appeals did address this question. 578 S.W.2d at 713. In an extremely convoluted argument, Petitioner contends that the court below did not in fact

deal with all these contentions. However, the fact that Petitioner finds the curt disposition of his argument unsatisfactory does not show that the Texas Court of Criminal Appeals failed to deal with it. The state law issues which Petitioner wishes to address concern the ability of one body of the state's bicameral legislature to "amend" a bill pending before the other by enactment of its own bill; and whether the caption of the capital murder act sufficiently informed legislators of its content. There is no federal constitutional interest sufficient to warrant this Court's interference in the affairs of the legislature of the State of Texas with respect to these issues. The Texas Courts have concluded that Petitioner's contentions have no merit.

CONCLUSION

The petition for writ of certiorari is not timely. This case involves an application of the principles of the prior law of Wainwright v. Sykes, 443 U.S. 72 (1977). Because the State of Texas affords an accused wide opportunity to obtain psychiatrist testimony when needed, this is not an appropriate case in which to consider whether indigents have a federal constitutional right to appointment of a psychiatrist in some cases. Nor does this case raise any issue with respect to the Fifth Amendment. Petitioner was advised of his right to remain silent before his psychiatric examination. The various theories which Petitioner advances in support of his petition are wanting. Some of them lack support in the record, and are thus not ripe for decision. Most of them lack any support in legal authority. At least one of them is beyond the jurisdiction of this Court because it involves purely state law questions.

WHEREFORE, PREMISES CONSIDERED, Respondent, the State of Texas respectfully prays that this honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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evidence has come to play, the unique character of the issue, the extreme consequences that rest on resolution of the issue, and the tremendous diversity of opinions on such matters within the field of experts that may qualify to give such evidence on the issue, it cannot be denied that for accused persons facing the possibility of death, expert behavioral witnesses for the defense are necessities, not luxuries.

If the scales of justice are to weigh equal regardless of wealth; if the hand of justice is to extend as far to those who cannot afford to hire an expert as to those who can; if the State is not to have exclusive access to experts; if the jury is to hear "all possible relevant information about the individual defendant whose fate it must determine," Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), and not hear only those experts of the prosecutorial persuasion; if fairness and open inquiry are to characterize the judicial exploration of the accused's mental condition and possible future conduct: then the indigent capital murder defendant must have equal access to psychological or psychiatric expert opinion testimony from some expert of his reasonable choosing, but not necessarily his first choice.

I concur.

ODOM, Judge

(Delivered February 28, 1979)

En Banc

Judges Roberts and Phillips join in this concurrence